No. 4503

In the

United States Circuit Court of Appeals

For the Ninth Circuit

FRED T. MERRILL

Plaintiff in Error

vs.

UNITED STATES OF AMERICA

Defendant in Error

Brief for Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Oregon

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STATEMENT OF FACTS

On May 10th, 1923, one A. B. Gates and two women visited a place known as the PLANTATION INN or TWELVE MILE HOUSE, in Multnomah County, Oregon. This Inn has, for the past 20 years been conducted and operated as a chicken

dinner establishment, and has been for many years past and still is owned by Mrs. Merrill, but managed by her husband, the defendant, a man about 66 years of age. Between the years 1914 to 1922 inclusive, the premises were leased to and were under the exclusive control of outside parties.

According to the testimony of the chauffeur Underwood, who drove the party to the place, Gates represented himself to be a cattle-man, and on the way out, produced and drank from a pint bottle containing moonshine which he invited the chauffeur to share with him. (Trans. p. 140.) Upon their arrival at the Inn, Gates ordered chicken dinners for the party, which were furnished. While at the Inn, he feigned intoxication, and his women companions provided entertainment by playing the piano and dancing with the other guests and generally permitted the impression that they were loose and dissolute women. It was on that occasion and under those circumstances, that Gates claimed that liquor was sold to him by the defendant, which alleged sale was made the basis of this prosecution.

Gates was not a cattle-man, but a prohibition agent, employed by the Sheriff, who furnished the two women, under general instructions to visit and investigate some seven or eight so-called Road Houses, in the vicinity of Portland. The women were paid $50.00 apiece, as well as their expenses incident to getting results under their employment.

The same general tactics of sham and trickery were employed by Gates and the women with respect to the other establishments which were visited at or about the same time. The defendant sought to prove that on one occasion Gates brought his own liquor to the place, drank it and caused the arrest of the proprietor for maintaining a nuisance, based upon the very same liquor that he himself had introduced for the sole purpose of bringing about an arrest. This fact, however, we were prevented from establishing at the trial, through a ruling of the trial court, which among other rulings is assigned as error, and which will be discussed under its appropriate heading.

On May 15th, 1924, acting upon the information of Gates, a raid was staged at the Plantation Inn, and while Mrs. Merrill was ill in bed and in the absence of Mr. Merrill, it was claimed by the Sheriff's Office, who conducted the raid, that they found secreted under the steps of a small veranda facing the second floor of the Inn, some ten bottles of liquor. Who put them there; how long they had been there, or whether they were cached there during the years 1914 to 1922, when not under defendant's control, they did not know.

Upon these facts being presented to the Assistant United States Attorney, he swore to an information containing three counts, charging; (1)—Possession. (2)—Sale, and (3)—Maintenance of a

nuisance, in violation of sections 3 and 21 of the National Prohibition Act, the date of each of these violations being fixed as of May 10th, 1923. Upon trial the defendant was convicted on all three counts and sentenced to 6 months in the County Jail and to pay a fine of $250.00, from which judgment this appeal is prosecuted.

ASSIGNMENTS OF ERROR RELIED UPON

1. Insufficiency of Information, on the grounds that same is not supported by affidavit showing probable cause. (Assignment No. 1.)

2. Insufficiency of Count One charging Possession on the ground that same does not state facts sufficient to constitute an offense. (Assignment No. 2.)

3. Insufficiency of Count Three charging Nuisance, on the ground that same does not state facts sufficient to constitute an offense. (Assignment No. 3.)

4. Error in admitting testimony of M. O. Nelson as to general reputation of Plantation Inn. (Assignment No. 3.)

5. Error in admitting testimony of W. H. Nickell as to prior sales. (Assignment No. 5.)

6. Error in refusing to admit evidence on behalf

of defendant as to conduct of business. (Assigment No. 34.)

7. Error in admitting record of judgment of conviction of defendant on September 6th, 1910, showing misdemeanor, (Assignment No. 6.)

8. Error in refusing to permit defendant to explain said record of conviction. (Assignment No. 7.)

9. Error in restricting cross examination of M. O. Nelson. (Assignment No. 4.)

10. Error in restricting cross examination of A. B. Gates. (Assignments Nos. 9 to 20 inclusive.)

11. Error in restricting cross examination of Ruth Meade. (Assignment Nos. 21 to 24 inclusive.)

12. Error in admitting and restricting certain testimony of Miss Martha Randall. (Assignment Nos. 25 and 26.)

13. Error in restricting cross examination of P. V. Rexford. (Assignment No. 29.)

14. Error in limiting cross examination of T. M. Hurlburt. (Assignment No. 38 and 39.)

15. Error in refusing to permit E. W. Aylsworth to explain his testimony as to general reputation of Plantation Inn. (Assignment No. 36.)

16. Error in refusing to admit evidence of general reputation of A. B. Gates for truth and veracity. (Assignment No. 32.)

17. Error in the instructions given and refusal to give requested instructions. (Assignments Nos. 40 to 50 inclusive.)

18. Error in refusing to instruct the jury upon the defendants theory of his defense in the case. (Assignment No. 48.)

I.

Insufficiency of Information on the Ground That It Is Not Supported by Affidavit Showing Probable Cause. (Assignment No. 1.)

The conviction in this cause was based upon an Information which, as appears from the transcript (page 6) is not supported by an affidavit of one having personal knowledge of the facts charged therein, but is simply sworn to by the Assistant United States Attorney to whom the case was referred.

The right of the District Attorney to file Informations for misdemeanors is conceded, provided leave therefor is first secured from the Court. It is assumed that the Court granted such leave. However, it is our contention that the Information filed in this case was insufficient to base any conviction against the defendant herein.

As stated in the case of *U. S. vs. Morgan*, 222 U. S. 274,

> "He cannot be tried on an information unless it is supported by the oath of someone having knowledge of the facts showing the existence of probable cause."

In the case of *U. S. vs. Wells*, 225 Fed. 320, acting under the authority of the decision in the case of *U. S. vs. Morgan,* supra, the court held,

> "That an information signed by the United States Attorney is not sufficient although he is a sworn official of the Government."

In the case of *U. S. vs. Illig*, 288 Fed. 939, the court said,

> "An information for violation of the prohibition act should issue only upon competent evidence and proper affidavit stating facts and not conclusions in order to comply with the constitution of the United States, Amendment IV."

II.

Insufficiency of Count One Charging Possession, on the Ground that the Same Does Not State Facts Sufficient to Constitute an Offense. (Assignment No. 2.)

Count I of the Information charges that on, to-wit, the 10th day of May, 1923, at the Plantation Inn, the defendant had in his possession a quantity

of intoxicating liquor, fit for beverage purposes, in violation of the National Prohibition Act.

This count is clearly insufficient. The mere possession of liquor by itself is not made a crime by the 18th Amendment, nor does Congress attempt to make it such by the Prohibition Act. All that Congress has done, or for that matter could do, under the limitations imposed by the Constitutional Amendment, was to make the possession of liquor illegal only when used for the purpose of effecting that which the amendment prohibited, to-wit: the manufacture, sale, transportation, importation or exportation of intoxicating liquor.

The Eighteenth Constitutional Amendment reads as follows:

> "After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited."

All that Congress, therefore, could do, was to put this amendment into effect, and it certainly could not enlarge on it by making the mere possession of intoxicating liquor, stripped of every other fact, a crime.

Section 3 of the National Prohibition Act, under which this count is predicated, reads as follows:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or posses any intoxicating liquor except as authorized under this act."

Construed in the light of the Constitutional Amendment, this acts seeks only to condemn the possession of intoxicating liquor when used as a means to effectuate the manufacture, sale or transportation of intoxicating liquor as thus prohibited. That this was so intended is borne out by the provisions of Section 33 of the National Prohibition Act which reads as follows:

> "After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title."

In other words, the mere possession of liquor in and by itself, while it may be charged against the possessor as a rule of evidence, cannot, however, be construed as a crime unless there is connected therewith the charge of manufacture, sale or transportation which must be the ultimate result of the possession. Therefore, it must follow, that to charge

a crime against the National Prohibition Act, the illegality of the possession must be made apparent from the facts set forth therein, to-wit; that the liquor was possessed for the purpose of sale or transportation or was the product of illegal manufacture.

All this count says, is that the defendant possessed intoxicating liquor for beverage purposes *in violation of the National Prohibition Act.* The words italicized amount to no more than to say that the alleged possession was contrary to law.

In *Keck vs. U. S.,* 172 U. S. 434, it was charged that the defendant did "knowingly, wilfully and unlawfully, import and bring into the United States, to-wit: in the Port of Philadelphia, diamonds" of a stated value "contrary to law and the provision of the act of Congress in such case made and provided." The Supreme Court held that the allegations were insufficient as being too general and not giving the defendant the requisite information of the nature of the accusations against him.

In the case of *U. S. vs. Dowling,* 278 Fed. 630, the defendants therein were charged with a conspiracy to possess intoxicating liquor contrary to the provisions of the National Prohibition Act. The court held this charge insufficient. In its opinion, the court said:

"It is apparent that the mere possession of

> intoxicating liquor is all that is charged. * * * It is clear that Congress is without authority to make the mere possession of intoxicating liquor, stripped of every other fact or incident, a crime. * * The Act (Volstead Act) cannot be said to denounce possession, isolated from all other facts or circumstances, as an offense, and if it did, it would exceed the power conferred upon Congress by the 18th Amendmend."

In the case of *Hilt vs. U. S.*, 219 Fed. 421, the Circuit Court of Appeals for the Fifth Circuit reversed a judgment of conviction on the ground that an indictment charging mere possession of liquor was insufficient. The court said:

> "Neither of the counts mentioned state any fact or facts showing that the alleged possession was accompanied by such a purpose or intent, or was under such circumstances as to render it a violation of law."

In the case of *U. S. vs. Cleveland,* 281 Fed. 248, it was held that it was not sufficient in an indictment for unlawful possession, to merely allege possession of liquor for defendant and its intended use thereof as a beverage. In its opinion the court said:

> "As long as the Act recognizes the right of possession and use at certain places and makes such possession illegal only at other places, then an indictment to be sufficient should state the time and place where the possession was illegal."

In the case of *U. S. vs. Illig,* 288 Fed. 939, it was held that an information charging that the defendant did unlawfully and wilfully have and possess a large quantity of intoxicating liquor without being authorized so to do in the manner provided by the National Prohibition Act was insufficient. In its opinion the court said:

> "The pleader wholly ignores the fact that the possession of intoxicating liquor is not made an offense by the Eighteenth Amendment; that Congress did not attempt in the Volstead Act, nor would it have the power, to make the mere possession stripped of every other fact, a crime. Possession can only be made an offense when prohibited for the purpose of making effective that which the Amendment prohibits."

In the case of *Street vs. Lincoln Safe Deposit Company,* 254 U. S. 88, the Supreme Court held;

> "That to render possession of liquor illegal is conditioned by the intended use in violation of the act, which as seen must bear some relation to manufacture, sale, transportation, importation, etc.,"

and Mr. Justice McReynolds, in his short concurring opinion, said:

> "Manufacture, sale and transportation are the things prohibited—not personal use."

III.

Insufficiency of Count Three, Charging a Nuisance, on the Ground that the Same Does Not State Facts Sufficient to Constitute an Offense. (Assignment 2.)

Count 3 of the information charges that on, to-wit: May 10th, 1923, the defendant, at the Plantation Inn, maintained a common nuisance, wherein intoxicating liquor for beverage purposes was then and there being kept and sold.

Section 21 of the National Prohibition Act upon which this count is predicated, has been frequently construed by the federal courts as requiring a habitual or recurrent sale, and that a general allegation that liquor has been and is being sold and kept for sale therein, is insufficient.

In the case of *U. S. vs. Cohen*, 268 Fed. 420, it was held that under Sec. 21 of the Volstead Act, declaring a place for the unlawful sale of intoxicating liquor to be a nuisance, it must appear that the sales therein were continuous or recurrent. In its opinion the court said:

> "I conclude that the use of the words 'sold, kept or bartered' in violation of the law, mean their repeated or continuous or recurrent sale or barter."

In the case of *U. S. vs. Butler*, 278 Fed. 677, the

court held that a bill to enjoin a nuisance must set forth the facts which constitute the nuisance, and that if a sale of liquor on the premises is alleged, it must appear that it was sold repeatedly, continuously and recurrently, and a general allegation that liquor has been and is being sold and kept for sale, is insufficient.

In the case of *U. S. vs. Dowling,* 278 Fed. 630, p. 643, the court said:

> "There is no showing of the maintenance of a nuisance. It may be said that, not only is there no showing that intoxicating liquors were kept in violation of the act, or in such manner as to come within the definition of a nuisance as contained in Section 21, but the allegations which should be present to show maintenance were also wanting. The word "maintenance" implies continuance, and the act implies it from the use of the word 'keep'."

The case of *U. S. vs. Dowling,* supra, also cites with approval and adopts the ruling laid down in the case of *Commonwealth vs. Peterson,* 138 Mass. 498, which is as follows:

> "The proprietor of a building cannot be said to keep or maintain a common nuisance on the strength of a single casual sale. To keep or maintain imply a certain degree of permanence."

The charging part of this count is bare of any facts and states mere conclusions to support the

same. If the test of a statutory nuisance, as defined by Sec. 21, is a place where liquor is continuously or recurrently sold or maintained, as would appear from the above authorities construing the section then it must naturally follow that to charge such a nuisance as would be in violation of law, an appropriate averment of such facts, not mere conclusions, should be alleged. This has certainly not been done in this case.

IV.

Error in Admitting Testimony of M. O. Nelson as to General Reputation of Plantation Inn. (Assignment 3.)

M. O. Nelson was called as a witness for the Government, and was permitted, over objection of the defendant, to testify in the Government's case in chief, as to the bad reputation of the Plantation Inn, as a place where intoxicating liquor was continuously kept and dispensed. (Transcript page 45.)

This testimony, if inadmissible, was clearly prejudicial to the defendant.

It is assumed that the only theory upon which it will be argued that this testimony was admissible, was to prove the charge that the defendant maintained a common nuisance.

The rule as to this sort of testimony is laid down in 33 C. J. 755:

> "Evidence of the general reputation of a place is not admissible, except where a *statutory* provision makes such reputation a pertinent fact in the prosecution and declares it to be competent evidence."

The danger of this testimony to the defendant must be readily apparent. It is true that in some of the State Prohibition Acts, and particularly the Oregon Prohibition Act, express provision is made for the introduction of this testimony, but the Volstead Act, under which this prosecution was brought, permits of no such latitude, and, therefore, we contend that in the face of this absence of express statutory authority, it was clearly indefensible to so extend the provisions of the Act as to permit the introduction of testimony that, under general circumstances, would not only be plainly inadmissible to prove a specific violation, but in the nature of this case, would be highly prejudicial.

In the case of *U. S. vs. Jourdine,* Fed. Cas. 15499, the court held that upon an indictment for keeping a disorderly house, the prosecution could not introduce in evidence the general reputation of the place.

In the case of *State vs. Boardman*, 64 Maine, 523, 528, the opinion read:

> "The defendant is indicted for keeping a house of ill fame, resorted to for the purpose

of prostitution and lewdness. The offense charged is that of a common nuisance. The gist of the offense consists in the use, not in the reputation of the house. Its reputation for lewdness and prostitution may be ever so clearly established, and yet if the evidence does not show that it was in truth used for those purposes, the first element in the offense is not proved; but if that is made out, it is immaterial what the reputation of the house was, or whether it had any. *The reputation of the house, under our statute, makes no part of the issue.* Testimony as to its reputation has no tendency to establish the issue that it was in fact used as a house of ill-fame, and is inadmissible as mere hearsay evidence. On trial of an indictment for a nuisance, it is not admissible to show that the general reputation of the subject of the nuisance charged was that of a nuisance.

The following authorities likewise support our contention that evidence of general reputation was not admissible:

State vs. Foley, 45 N. H. 466.
State vs. Henson, 63 Md. 231
State vs. Hardy, 63 Miss. 207.
State vs. Sparks, 59 Ala. 82.
State vs. Toney, 60 Ala. 97.

V.

Error in Admitting Testimony of W. H. Nickel as to Prior Sales. (Assignment No. 5.)

Over the objection of the defendant, the Government permitted to call in its case in chief, one W. H. Nickel, who testified that in April, 1923, he was employed as a waiter by the defendant at Plantation Inn for a period of from 10 to 12 days, and that while so employed the defendant sold liquor on said premises. (Transcript, page 47.)

The defendant was not charged in the Information with this offense, it occurring some three or four weeks prior to May 10th, 1923, the Information being confined exclusively to the Gates episode. The court, however, admitted the Nickel testimony on the theory that it was pertinent to the charge of maintaining a nuisance.

By whatever name it may be called, the fact remains that this was evidence of a distinct and separate offense, entirely different and independent from the one charged, and under the general rule, clearly inadmissible and highly prejudicial. It is not difficult to understand how such evidence might prejudice a jury, and bring about a conviction, because the jury might believe that he is at least guilty of this other offense, especially in a case of this character where the evidence of the Gates episode was conflicting, and was subject to the defense of entrapment and improper methods used in effecting the arrest of the defendant. Surely the defendant should not have the burden of defending against a separate and different offense introduced in evi-

dence, for which he was not indicted, nor informed against, and which had no tendency to prove the specific charge for which he is on trial.

The rule is stated thus in 16 C. J. 607:

> "On a trial for maintaining a liquor nuisance, proof of unlawful sales of intoxicating liquors by accused is admissible to show the intent with which the liquors were kept on the premises, but the proof *must not include sales prior to the period charged.*"

In the case of *State vs. Benson,* 154 Iowa 313, 134 N. W. 851, the court said:

> "The defendant was accused in the indictment of having maintained a place wherein intoxicating liquors were kept for sale and sold contrary to law between March 1, 1909, and February 24, 1911, the time of finding the indictment. On trial, testimony of three witnesses that he had sold whiskey prior to March 1, 1909, was received over objection. This was error which was not obviated by the seventeenth instruction in which the jury was told that such testimony should be considered by them only as it may tend to throw light on the intentions and motives of defendant in making sales between the 1st day of March ,1909 and the 24th day of February, 1911, and as to whether such sales were made for medicinal purposes or as a beverage."

In the case of *Day vs. U. S.* 220 Fed. 818, the court said:

> "It is a familiar and long established rule that similar acts or misdeeds of the accused are inadmissible against him, except where they are material in proof of some necessary element of the offense for which he is on trial. This rule is laid down by all the writers and in numberless decisions."

In the case of *Ford vs. U. S.* 259 Fed. 552, it was held:

> "The danger of this kind of evidence is that it is likely to lead the jury aside from the case on trial, confuse the issues ,and result in a conviction for acts not included in the indictment."

In the case of *Marshall vs. U. S.* 197 Fed. 511, it was held:

> "If an act is shown to be illegal, it is enough. The prosecutor may safely rest on such proof; it does not add to its illegal character to show that it was repeated."

In the case of *Boyd vs. U. S.* 142 U. S. 454, the court said:

> "On the trial of a person indicted for murder, it appeared in evidence that the killing followed an attempt to rob. The court admitted, under objections, evidence tending to show that the prisoner had committed other robberies in the neighborhood, on different days,

shortly before the time when the killing took place. Held that the evidence was inadmissible for any purpose."

In the case of *State vs. Wilson,* (Ore.) 230 Pac. 810, it was said:

"One class of objections to the procedure of the court is that the prosecutrix was allowed to testify, over the objection and exception of defendant, that she became pregnant by him, and that he performed two separate and distinct operations upon her, resulting in the death of the fetus with which she was at the time pregnnat, prior to the one named in the indictment. This is contrary to the rule laid down in this state. * * * * One consequence of supporting the procedure allowed in this respect by the trial court would be that no defendant could know how many violations of the law he would be called upon to defend upon a single charge; neither would he know when his prosecutions for some offense would come to an end. Another result would be that, having narrated in testimony all the instances constituting separate offenses, and failing in the prosecution of one, the state could take precisely the same evidence, and, by changing the date of the indictment, prosecute a defendant on the same testimony an indefinite number of times. The statute contemplates the statement in the indictment of a single offense, and that the evidence shall be confined to that charge alone of which the defendant has been informed. The principle is settled in this state by the precedents cited."

VI.

Error in Refusing to Admit Evidence on Behalf of Defendant as to Conduct of Business.
(Assignment 34.)

Russell Underwood, a witness for the defendant, testified that he was employed by defendant, beginning on May 11th, and for a period of 2½ months thereafter. During his examination the following proceedings were had:

> Q. As such waiter, did you receive any instructions from Mr. Merrill concerning liquor or the use of liquor by the guests?
>
> Mr. Stearns: Just a moment, if your Honor please. If that question is confined to the time prior to Mr. Merrill's arrest, I have no objection; but if it is since then it would be a self-serving declaration, and would not be admissible, I think.
>
> Mr. Goldstein: This is prior to May 15th, which is one of the alleged acts of nuisance. He was working prior to that time. I imagine your Honor would rule I could prove anything immediately prior, immediately subsequent, so long as it is close enough to the alleged occurrence of the nuisance to show how the place was being conducted.
>
> Court: Confine it to the 15th.
>
> Mr. Goldstein: May I have an exception to your Honor's ruling?
>
> Court: Yes.
>
> Mr. Goldstein: I understand the court has

ruled that I cannot show by this witness the method of conducting the place of business immediately after May 15th?

Court: No.

Mr. Goldstein: I will take an exception to your Honor's ruling.

(Transcript, 142, 143.)

In our opinion, it is inconsistent for the court to permit the testimony of Nickel as to sales made months before the date charged in the information, upon the question of nuisance, and yet not permit the defendant to prove the conduct of business immediately following the date of the occurrence, upon the same question of nuisance.

VII.

Error in Admitting Record of Judgment of Conviction of Defendant on September 6th, 1910, *Showing Misdemeanor.* (Assignment 6.)

The court permitted the Government, over objection to show that the defendant had been convicted of a misdemeanor in 1910 (Abstract, page 132.)

Upon taking the stand in his behalf, the defendant was cross-examined by the Government as to whether he had not been convicted of a crime, and for the purpose of discrediting his testimony, there was permitted to be introduced in evidence a cer-

tified copy of the record of conviction. It developed that some 13 years prior to this trial, the defendant had entered a plea of guilty to a simple misdemeanor, for which he was fined.

The offense which the defendant was alleged to have committed in 1910, aside from being remote and in no wise connected with the specific offense charged in 1923, or with the Volstead act, upon which it was found, did not even rise to the dignity of a felony, but at most was a misdemeanor of a trivial character.

We contend that the court erred in admitting this record of conviction of a misdemeanor, for the purpose of impeaching the credibility of the defendant.

> "A witness cannot be asked if he has been convicted of a crime, in a particular court where the statutes permit him to be examined only as to certain infamous crimes."
>
> (Wharton on Criminal Evidence, page 558.)

In the case of *Hayden vs. Commonwealth,* 140 Ky. 634, it was held:

> "Credibility may be impeached only by showing conviction of a felony."

In the case of *Williams vs. State,* 144 Ala. 14, it was held:

> "Evidence of conviction of crime not in-

famous is not proper subject of proof for purpose of affecting credibility."

In the case of *Solomon vs. U. S.* 297 Fed. 82, the head note reads as follows:

> "The record of the conviction of a witness of a misdemeanor, which would not under the General Common Law, or the Common Law of the State, have rendered him incompetent as a witness, is not admissible to effect his credibility."

Under the Common Law, a defendant in a criminal case was not a competent witness and, prior to the act of Congress of March 16th, 1878 (20 St. L. 37—U. S. Comp. St. 1465), by which a defendant was made a competent witness in a criminal case, no record of conviction of an offense found against him in a Federal or State Court, could be introduced in evidence, to impeach his credibility, and that having been made a competent witness by statute, such evidence could not be used, except where there is a statute of the United States permitting it, *or where, by the law of the state in which the trial was had, such evidence was admissible when the courts of the United States were established by the judiciary act of* 1789. So far as the State of Oregon is concerned, the laws thereof would have no application, for Oregon was not admitted into the Union until 1859.

There is no Federal statute authorizing the use of this evidence, and the question then arises, what were the crimes at common law, the nature of which a record of adjudication would render a witness incompetent and may not be used to affect his credibility.

At common law, in criminal cases, in addition to defendants, persons convicted only of crimes which rendered them infamous were excluded from being witnesses, and by the term "infamous" is meant crimes of treason, felony and *Crimen Falsi.* (Wharton on Criminal Ev., page 730.) For a long time no such person was permitted to testify in the Federal courts, and this disqualification was only removed through the decision announced in the recent case of *Rosen vs. U. S.* 245 U. S. 467. However, while a person who had been convicted of an infamous crime, may now be a witness in the Federal court, it must necessarily follow that only the conviction of an infamous crime may be proved to effect credibility. (Wharton on Criminal Ev., page 731.)

In the case of *Jianole vs. U. S.*, 299 Fed 499, the trial court in that case allowed the defendant, over objection, to be questioned in regard to a former plea of guilty to the charge of unlawful manufacture of liquor. The testimony referred to showed that the defendant had pleaded guilty to a misdemeanor a year and a half before the date of the

alleged felony, (Conspiracy to violate the prohibition act), for which he was then on trial. The Appellate court, in holding this testimony incompetent, said:

> "There was no connection between the two, either in respect of time or similarity of offense."

While the record of conviction, introduced in this case, of the offense committed in 1910, is of a simple misdemeanor and even that, of the most trifling character, yet the effect thereof upon the jury was undoubtedly as strong as if the defendant had been guilty of the most heinous crime, and therefore, if inadmissible, was clearly prejudicial.

The vice of showing that in the 66 years of defendant's life there was this blot some 13 years past, even though remote, is clearly set out in the case of *State vs. Saunders,* 14 Ore. 309.

> "Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs—no matter what explanation of them he attempts to make—it will be more damaging evidence against him and conduce more to his conviction than direct testimony of his guilt in the particular case. * * * * * * * The judge might demurely and dignifiedly tell the jury that they must disregard the evidence, except so far as it tended to impeach the testimony of the party; but what good would that

do? And it is not all improbable that he himself would imbibe some of the prejudice which proof of the character referred to is liable to engender."

VIII.

Error in Not Permitting the Defendant to Explain Record of Conviction. (Assignment No. 7.)

After the Government was permitted to introduce in evidence, for the purpose of discrediting the testimony of the defendant, a record of conviction of a petty misdemeanor, alleged to have been committed some 13 years prior to the trial, the Defendant sought to explain same, but was peremptorily stopped by the court:

> Court: "I do not think the witness can deny the record, and it is not necessary for him to go into it, I will not permit it."
>
> Mr. Goldstein: May I have an exception? (Transcript page 133.)

In Wharton on Criminal Evidence, page 1015, 1238, the rule is stated thus:

> "A record of conviction, when offered to disqualify a witness, cannot be impeached, but when a record of conviction is offered for the purpose of *discrediting* (not excluding) a witness, it may be impeached.
>
> Even supposing that it is admissible at common law to put in evidence in order to discredit a witness, his conviction of the specific

crime, a record, when admitted, in so far as concerns the parties to the suit is res inter alios acta (a thing done between others), and hence it is open to impeachment by proof of the witness's innocence and the judgment so far as it affects persons not parties to the record and who could not have become parties, is res inter alios acta and if admissible at all, is open to impeachment."

The same rule is stated in 16 C. J. 592.

"When evidence of other crimes has been introduced, defendant is entitled to explain transactions. He may explain why he pleaded guilty."

In the case of *Sims vs. Sims*, 75 N. Y. 466, 475, it was held that a fact proved by a record of conviction is not conclusive, but may be rebutted.

In the case of *U. S. vs. Stickle*, 15 Fed. 798, the court, in instructing the jury upon the record of a former conviction introduced to discredit the defendant, said:

"And of course, it will be proper for you to consider the statements of the defendant in regard to his pleading guilty to that charge, that he did it to save expense, etc. Of course, a person charged with a crime might plead guilty and suffer a conviction when he fully believes himself to be innocent. Whether he did so or not it will be proper for the jury to consider in this part of the case."

The jury in this case had no opportunity to consider the statement of the defendant as to his plea of guilty to the 1910 judgment, for the court prevented it from being made, to the defendant's evident prejudice. That he had an explanation to make is apparent from the transcript, indicating the numerous attempts made by the defendant to do so, which in every instance, was promptly suppressed by the court. In this, we contend, the court was in error, and that it was prejudicial, needs no comment.

IX.

Error in Restricting Cross Examination of M. O. Nelson. (Assignment No. 4.)

On cross-examination, a Government witness, M. O. Nelson, was asked whether he had ever discussed the case with Mr. Hurlburt (the Sheriff); whether it was not a fact that the witness had urged the trial of the defendant at Gresham, before his neighbors; how many editorials he had written on the subject of the defendant, and the Plantation Inn (it having been developed that he was an editor of the "Portland Telegram"), to all of which questions objection was interposed by the Government and sustained by the court. (Trans. pp. 46-47.)

While it may be conceded that as a general rule, the trial court is vested with considerable latitude in limiting the scope of an examination, yet, at the

same time, it must likewise be conceded that a full cross-examination, within proper limits, is not a mere privilege, but is an absolute right, and a denial of this right is prejudicial. (*Herd vs. U. S.*, 255 Fed. 829.)

It is always permissible to show interest, bias, and prejudice of a witness! Would not the fact that he discussed the case with the Sheriff who furnished the people responsible for this prosecution, be of importance in determining the interest of Nelson? Would not the fact that he had written editorials that molded public opinion against the defendant, be of importance in determining the bias and prejudice of Nelson?

As stated in the case of *State vs. Ellsworth,* 30 Ore. 150:

> "A jury is entitled to know the bias of a witness and the extent to which his feelings are enlisted in the cause, so that they can fairly interpret the weight to be given to his testimony, and for the purpose of ascertaining his opinion it is proper to ask on cross-examination, if he had not expressed a certain feeling, or used a certain expression concerning a case."

The rule in Federal Courts is thus stated by Zoline on Federal Criminal Law and Procedure, pages 316-318:

> "A full cross-examination of a witness upon

the subject of his examination in chief, is an absolute right, not a mere privilege of the party against whom he is called, and a denial of this right is a prejudicial and fatal error."

In the case of *King vs. U. S.*, 112 Fed. 988, 995, the court said:

"In the cross-examination of witnesses in criminal cases a wide latitude is permitted. It is always permissible to show the interest, bias and prejudice of the witness, and to inquire about any and every relevant and material matter to the issue in controversy which tends to throw any light upon the feelings of the witness or explains or makes clear his situation with respect to the defendant, in order that the jury may be fully informed of all the facts and circumstances tending to throw light on the weight and importance of the evidence as given."

X—XI.

Error in Restricting and Limiting Cross-Examination of A. B. Gates and Miss Ruth Meade, Witnesses for Government. (Assignments 9 to 24, inclusive.)

As already indicated, the prosecution was based upon the testimony of three informers, who, according to their admitted testimony, feigned intoxication and pretended to be fast and dissolute characters, in order to bring about the arrest of this defendant on the charge of violating the liquor laws.

The charge in the information was based entirely upon the testimony given by these informers, and the conviction, to be sustained, must of necessity have been obtained because of the credit given by the jury to their testimony; it was, therefore, most important to the defendant that his right to a fair and full examination of these witnesses be respected by the trial court. This right, however, was denied him.

It was the theory of the defense, that the liquor introduced in evidence by the Government as having been purchased from the defendant, was liquor which these informants had themselves carried upon the defendant's premises. In this connection, attention is called to the testimony of Russell Underwood, the chauffeur who conveyed these people to the Plantation Inn. Underwood, in brief, testified that enroute to this place, Gates represented himself as a cattle man, produced a bottle of liquor from which he drank and likewise invited Underwood so to do; that upon reaching the place, Mr. Gates, pulled out a bottle of liquor and set it on the bar, which the defendant ordered him to remove; that Underwood saw no liquor upon the premises except that in the possession of Gates. (Trans. 141-142.)

It was further contended by the defendant, and the cross-examination was attempted to elicit this fact, that immediately preceding and following this visit to the defendant's premises, Gates had visited

some 7 other alleged roadhouses, and that at least on one occasion, the liquor nuisance charge was predicated entirely upon the liquor that Gates himself had introduced and drank thereat.

It was further contended by the defendant, that all these prosecutions of so-called roadhouses, made within the course of two or three successive days, were the result of certain general instructions received from the Sheriff of Multnomah County, who advanced the expenses of bringing about these prosecutions. This was in fact admitted by Miss Meade under examination by the court:

> O. Well, now, did those instructions apply to any particular roadhouse?
>
> A. Those instructions that Mr. Christoffersen gave us in the afternoon for whatever roadhouse we visited.
>
> Q. Well, did they apply to any particular roadhouse?
>
> A. No, they would apply to all of them.
>
> Q. Did he instruct you as to what you were to do in going out to the Twelve Mile House?
>
> A. Well, those instructions he gave us were general, as I understood it, for all of them.
>
> Q. They were general?
>
> A. Yes, sir.
>
> (Supplement Transcript, page 4.)

It must, therefore, be readily seen, that it was important to ascertain what these instructions

were, how they were carried out, and if Gates, in order to procure a violation of the liquor law, was the producing cause of the liquor which was made the basis of those prosecutions.

The following excerpts of the testimony will indicate more clearly the defendant's contention in this regard, and the court's attitude in stifling the cross-examination of a material witness, whose confessed practice of sham and trickery, in and by itself, warranted the most rigid and careful scrutiny of the jury as to his credibility.

Mr. Gates had stated that he was a detective for about 30 years, and for 2 years had been employed as a detective by the Anti-Saloon League; that at the time of the investigation of the Plantation Inn, he was a prohibition agent, but was receiving instructions from the Sheriff; (Transcript, 59.) that his two female associates were assigned to him by the Sheriff, (Transcript, 60) and that enroute to, and upon his arrival at, Plantation Inn, he feigned intoxication and represented himself to be a cattle man out for a good time; (Transcript 58). On cross-examination the following proceedings were had:

> Q. Well, then there was something discussed between you and the Sheriff's office as to how the investigations were to be handled?
>
> A. No, sir.
>
> Court: I don't think you need go into that. It is enough that this man was employed by the Sheriff to do detective work and was assigned to this matter.

Mr. Goldstein: I want to know what the employment was supposed to contemplate—whether it was supposed to contemplate taking the women out with him, or what control he had over the women.

Court: He has already said they furnished him these two women, and I think that is enough.

Q. On May 10th, prior to going out to Mr. Merrill's place, you had a conversation with Mr. Hurlburt or Mr. Christoffersen or someone in the Sheriff's employ, with respect to the two women that you were to take out with you, did you not?

A. Yes, sir.

Q. Now, at that time were you informed as to what roadhouses you were to investigate?

A. They told me to investigate the road houses, yes sir.

Q. How many road houses did you investigate?

A. I investigated eight of them.

Q. Of all these eight roadhouses you investigated pursuant to that instruction, you went out with these two ladies?

Court: He didn't say eight roadhouses. He has already explained that. He said he went out to investigate roadhouses. I thought he said eight. Pardon me. How many roadhouses did you investigate?

Mr. Bynon: I object to this. We are still trying to try this one case. What happened at other times subsequent to this has no bearing upon the guilt of the accused.

Court: I think you have gone far enough with that.

* * * * *

Mr. Goldstein: * * * * I intend if the court will bear with me, to connect this testimony with positive proof by one of the Government's witnesses that these deliberations and arrangements had been made prior to going out to Mr. Merrill's place, which contemplated doing certain things which are allied with our theory of the defense. As I have aleady stated in my opening statement, I am going to prove by the defense that this man started out with liquor toward the place. He denies he took liquor out there. I want to show an arrangement and agreement that he had with the Sheriff's office, prior to going out there, in certain cases for the use of liquor. In the interest of truth and justice, it it usual to allow considerable latitude in the examination of an adverse witness, especially where the testimony is hostile, etc.

I do feel, honestly and conscientiously, that I ought to have a right to show by this witness that not more than two days afterwards, on the same investigation of similar roadhouses, he went out with liquor to a certain place, and that he consumed liquor on the way out there, and he drank the liquor in that place, and left the empty bottle there with some of the contents, and went back and swore out a warrant against the man for the only liquor there, that had been brought by himself.

That I can prove, if I am permitted.

Court: You will not be permitted to prove that.

Mr. Goldstein: So as to make that clear, I will ask him this question. During the course of his negotiations with the Sheriff prior to going out to Mr. Merrill's place, if at that time there had not been some discussion or understanding as to the methods that he was to use in his investigation of these roadhouses.

Court: You were instructed to make investigations of roadhouses?

A. Yes, sir.

Court: And you went there. You were left to your own course as to what you should do?

A. Yes, sir; they didn't tell me what to do. They left that up to me.

Mr. Goldstein: I propose, if the court please, to discredit that.

Court: Well, you will have to prove it from your own resources, then.

Mr. Goldstein: I can prove that by one of their witnesses. As long as he is on the stand here, I wanted to go into that.

Court: That is as far as you can go with this witness.

(Trans. pp. 61-66.)

Whereupon witness was asked the following question:

"Is it not a fact that, during the course of your investigation of these roadhouses, you did take out liquor with you which you used as the basis for swearing out a warrant of arrest against a party in whose place you brought the liquor?"

To which question objection was made and sustained and exception allowed.

Whereupon the following question was propounded to the witness:

> "Now, I will ask you, Mr. Gates, if at any time prior to May 10th, in making your investigations, you had occasion to use liquor as a means of inducing violations of law?"

To which question objection was made and sustained and exception allowed.

(Trans. p. 68.)

Later, in the course of the cross-examination, the following proceedings were had:

> Q. Didn't you, as soon as you arrived at the place, take out a bottle from your pocket and flourish it in the air?
>
> A. No, sir.
>
> A. You didn't do that?
>
> A. No, sir.
>
> Q. You might have done it on other occasions?
>
> Objected to.
>
> Court: I have already ruled on that.
>
> Mr. Goldstein: I will ask him the question, and then, please, may I take an exception in the record, to show the purpose of these questions and to show the methods employed by him along those similar lines I am asking about?
>
> Court: At other places?

Mr. Goldstein: In connection with that particular employment.

Court: The court will not permit you to ask those questions. I have ruled on that once or twice. I tried to make myself plain.

Mr. Goldstein: I understand, if the court please. I want the record to show.

Court: You will not be permitted in this case to go out and examine this witness as to other roadhouses, and what he did at those places. I might as well put a stop to that right now.

Mr. Goldstein: I am not going to pursue that any further as to this witness, only as it might affect his credibility as a witness. That is the only purpose, for the purpose of showing his motive and interest. May I have an exception to your Honor's ruling?

Court: You may have your exception.

(Trans. p. 81-82.)

Again the cross-examination was interfered with as follows:

Q. Now, Mr. Gates, you have been on liquor investigations for how many years?

Court: You have been all over that.

Mr. Goldstein: Just one point.

Court: I think we better put a stop to that now, because he has been over that.

Mr. Goldstein: He says he never took a drink outside of business. Now, I want to find out—

Court: You have been all over that question. There is no use taking up further time of this court with it.

Mr. Goldstein: May I ask one question?

Court: You may ask one question to get it into the record.

Q. On the very first time you went out on a liquor investigation, stating that you had never taken a drink except on business, how did you at that time know the difference between the various kinds of liquor, without ever having had occasion to drink it except on business?

Mr. Stearns: If your Honor please, that question is objected to as incompetent.

Objection sustained.

Mr. Goldstein: May I have an exception?

(Transcript, page 92.)

Miss Meade, who accompanied him on this trip, testified that she had also feigned intoxication and had played the piano at the place for "atmosphere," (Transcript 96-97) and had received $50.00 in a lump sum for her investigations of eight roadhouses, covering a period of three successive days, (Transcript 106-107) and that arrangements were made the afternoon of May 10th, as to what they were to do at these roadhouses. (Transcript page 100). She was then asked the following question:

Q. I will ask you if it is not a fact, that, during those three days investigating those roadhouses, there were three or four times when such liquor was taken out?

Mr. Stearns: Just a moment.

Court: The objections will be sustained to that.

Mr. Goldstein: May I have an exception?

Court: Yes.

(Transcript page 107.)

Q. Isn't it a fact that you played the piano in all these eight roadhouses?

Objected to.

Court: That is objectionable. I have ruled it out several times. I wish counsel would not refer to it again.

Mr. Goldstein: May I have an exception?

Court: You may have an exception, yes.

(Transcript, page 111.)

In this connection, attention is called to her admission under examination by the court, that they had received general instructions covering the investigation of all these roadhouses, and that they did not apply to any particular roadhouse. An attempt was thereupon made, during her cross-examination, to elicit the fact that on a prior occasion she had admitted that part of her instructions were to go out to these places with whiskey, if they had to. While defendant's counsel was permitted to ask this question only after considerable difficulty, and after the court had erroneously stated he had been misled, yet the defendant was prevented from inquiring whether she had not testified on a previous occasion as to the purpose of taking liquor out, and the purpose of giving part of the liquor to the taxi driver. The court is particularly urged to read the Supplemental Transcript, which contains this testi-

mony and indicates the difficulties and obstacles that confronted defendant in exercising his right of cross-examination.

The following excerpts are illustrative:

Q. Well, then, for the purpose of refreshing your recollection, I will ask you if you didn't state—for the purpose of impeachment, I will ask the following question, if you didn't testify on May 29th, just nineteen days after this alleged occurrence, the following, in the presence of Cloyd D. Rauch, a court reporter in Judge Hawkins' court room, the following testimony:

(Page 4.)

* * * * *

Q. "Were you supposed to go out with whisky?" A. "If we had to, yes." Q. *"Were you supposed to go out with whisky?"* I repeated the question: A. *"When we had to."* Q. *"Well,, did you go with whisky on an expedition?"* A. *"Sometimes."* A. *"Well, who furnished you with the whisky?"* A. *"Mr. Gates bought it."* Q. *"Well, Mr. Gates would start out on a trip with whisky?"* A. *"Yes, some of the time."* A. *"How many times?"* A. *"I don't know how many times."* Q. *"What was the idea of taking whisky in a taxicab?"* A. "For this reason, if you want to know." Q. "That is what I am asking you." A. "Because with this on our breath; we took it to our lips—the reason was so we could walk in these

places, they wouldn't think we had come from some office."

(Page 6.)

* * * * *

A. "That was the reason. *And the other reason was that, when the taxi driver had a drink, he told us a good many things and took us a good many places.*" Q. "That was for the purpose, first, of yourself giving an atmosphere of inxtoxication when you approached the place?" A. "More or less." Q. "Second, for the purpose of intoxicating and inebriating the taxicab driver to make him look—" A. "We didn't give him enough to make him intoxicated." A. "Just to make him talkative?" A. "Yes." Q. "So there were two reasons: First, to give yourself an atmosphere of intoxication?" A. "Yes, sir."

Court: That is going too far with that. * * * Give me that testimony.

(Pages 7 and 9.)

* * * * *

Court: You may ask as to this, starting with question on page 95, and reading, "Well, I will ask you again," down to the question, "Were you supposed to go out with whisky? A. When we had to," at the top of page 97. I am not going to open up this whole matter on a side issue. You may ask her that as an impeaching question.

(Page 10.)

* * * * *

Mr. Goldstein: Your Honor rules I cannot proceed further?

Court: That is as far as you may go.
Mr. Goldstein: May I take an exception?

(Page 11.)

* * * * *

We feel confident that no legal authority can be submitted by the Government, that will justify the court in restricting our right to impeach a hostile witness, upon a most material inquiry, to-wit, whether she had not testified on a previous occasion, that in accordance with their general instructions, from the Sheriff, not only was liquor used by them in investigating these roadhouses, but that liquor was actually given to the taxi driver, just exactly as was testified to by the taxi driver, Underwood, in this case. Had the court permitted, it might have been interesting to learn where Gates procured his liquor, which he possessed, transported, and shared with taxi drivers, in violation of the law.

Attention is also called to the testimony of Miss Johnson, who stated that she was employed to accompany Gates and Miss Meade, in the investigation of roadhouses adjacent to Portland; (Transcript, page 52) that she and Miss Meade called Mr. Gates "Father" in order to play the game, and to show that they were rounders out for a good time; she also received $50.00 from the Sheriff for her services in investigating the different roadhouses. (Transcript 55.)

Summarizing this testimony, we must conclude that Gates, Miss Meade and Miss Johnson, were employed by the Sheriff to investigate eight roadhouses in and about the city. Their investigation was completed in the course of two or three successive days. Miss Meade and Miss Johnson were each paid $50.00 for their services, and the party were reimbursed for their expenses, most of which, according to their testimony, was utilized in imbibing intoxicating drinks, dining on delectable viands, and paying taxi fares. The plan of operation, according to Miss Meade's testimony, was general in its scope, and applied to all the roadhouses investigated, as note her testimony, which was elicited by the court itself. (Sup. Trans. page 4.)

In the face of this testimony, coupled with the testimony of the taxi driver, that Gates and his party had liquor with them enroute to the Plantation Inn; that Gates brought some of it on the premises, and in the face of Merrill's denial that he sold any liquor to these informers, we contend that we had an absolute right to cross-examine Gates and his partners, upon the fact that in the course of their investigations they had actually introduced liquor to an alleged roadhouse, drank same thereat, and that they thereupon caused the arrest of the proprietor, based upon the very liquor which they themselves introduced and drank. The jury was entitled to know what reliability and credit should be

given to the testimony of Gates and his associates, at it was entirely upon their testimony that the verdict of guilty could be sustained, if at all. With our examination of the principal actors thus restricted, we were prevented from showing,

(1) What the general plan of operation was in the course of these investigations.

(2) If the plan contemplated the use of intoxicating liquor, and the transportation of same to the place marked for investigation.

(3) If the informers actually did introduce liquor into any of these so-called roadhouses and base their prosecution thereon.

(4) That the testimony they gave at this trial was inconsistent with that given on other occasions.

(5) That if they had actually introduced liquor to other places, in the course of these investigations, and pursuant to instructions, then how could they reconcile their actions on these occasions with their present denial of the use of liquor in investigating the premises of this defendant?

Under the foregoing circumstances, we earnestly contend that the court erred in thus impairing a most valuable right of defendant, to fully cross-examine a material witness on the very subject of his testimony, to-wit, the plan of operation used in making these investigations; that had the defendant been permitted to exercise this right, the testimony thereby elicited would have corroborated the testi-

mony of the taxi driver and Merrill, that the liquor which the informers claim to have purchased, had been introduced by the informers themselves and drank thereat. This would also have borne out our theory of entrapment so far as the charges of possession and of maintaining a nuisance were concerned, as well as justify the jury to infer that the conduct and actions of these informers in investigating one roadhouse, had been followed in this particular, of which fact positive proof has been submitted by the defendant.

We submit the following authorities in support of our position, that we were prejudiced by the action of the trial court in interfering with our right of cross-examination.

> "Witnesses who have been hired by the party for whom they testify to procure evidence to work up the case, are interested, and their testimony should be carefully scrutinized."
>
> 40 Cyc. 2655.

> "It is proper cross-examination to interrogate a witness as to conduct on his part inconsistent with what would be natural or probable if his statements on his direct examination were true."
>
> 40 Cyc. 2485.

> "A witness who has testified to certain facts, circumstances and occurrences, may be interrogated on cross-examination as to other similar facts, circumstances or occurrences,

where such a line of examination tends to elucidate his testimony."

40 Cyc. 2486.

"A witness who, on his direct examination has testified as to a part of a transaction, may be required on cross-examination to give the whole."

40 Cyc. 2491.

"A witness may be discredited by showing that he has been guilty of fraud in connection with the subject matter of his testimony, and a party who takes the stand may be discredited by showing that he acted dishonestly in a transaction similar to that involved in the suit."

40 Cyc. 2581.

In the case of *Lewis vs. Boston Gas Light Co.,* 165 Mass. 411 43 N. E. 178, it was held:

"That a witness who stated that he laid gas pipes in a certain street in a proper manner, may be cross-examined as to how he laid the pipes in another street."

In *Di Salvo vs. U. S.,* 2 Fed. (2nd. Ed.) 222, the court said:

"Where one of the defenses was entrapment, questions asked in cross-examination of a Government witness, who was one of the parties to an alleged entrapment, as to what transpired between them prior thereto were competent and their exclusion was error."

In the case of *Gallaghan vs. U. S.,* 299 Fed. 172,

the defendant was prevented from fully cross-examining several of the Government's witnesses. The record in that case is not unlike that at issue, and it was held that the action of the trial court in denying counsel the right to cross-examination, was a clear denial of defendant's legal rights.

The court in its opinion, cited with approval, the following:

> "Cross-examination is the right of a party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, rumor from truth, opinion from fact, and inference from recollection, and of testing the intelligence, memory, impartiality, truthfulness and integrity of a witness."

In the case of *York vs. U. S.*, 299 Fed. 778, it was contended that the trial court had made frequent interruptions in the cross-examination of the Government witness, and prevented his full cross-examination. The Appellate Court held,

> "Whatever may be the opinion of the Judge as to the credibility of the witness, he should permit full cross-examination of the witness without unnecessary interference."

In the case of *Jianole vs. U. S.*, 299 Fed. 499, error was ascribed to certain remarks and rulings made by the court in refusing to allow a full cross-examination of certain Government witnesses that

would test their credibility and knowledge of matters they testified to. The Appellate Court held that such remarks and rulings were highly improper, tended to prejudice the jury and prevented the fair and impartial trial that defendant was entitled to.

In the case of *Herd vs. U. S.*, 255 Fed. 829, the court, after declaring the rule that a full cross-examination is an absolute right, and not a mere privilege, said:

> "It was proper, relevant and material cross-examination, to draw further from the witness the fact that when the transaction was recent, and his recollection was fresh, that he told a different story, one so inconsistent with that to which he testified, that both stories could not be true. That was material cross-examination because it at once challenged the credibility of his testimony, and the more in detail his first story was, the more incredible it rendered his evidence. The cross-examiner has a right to prove, by his adversary's witness, if he can, what inconsistent statement he has made. Not only in general but in every material detail, for the more specific the contradictory statements were, the less credible is the testimony of the witness.

In the case of *State vs. Mah Jim*, 13 Ore. 235, it is said:

> "Great latitude should be allowed on cross-

examination, especially where the witness belongs to a class whose testimony general experience proves to be unreliable. Counsel should be allowed to pursue their own course in eliciting testimony, so long as they keep within reasonable bounds, and testimony that has any possible bearing upon the defendant's case should not be excluded."

"Matters not connected with the direct examination of the witness may be inquired into for the purpose of testing the accuracy, veracity and credibility of a witness."

To like effect are the following cases:

Maxwell vs. Bolles, 28 Ore. 1.
State vs. Ellsworth, 30 Ore. 150.
State vs. Savage, 36 Ore. 209.
Smitson vs. S. P. Co., 37 Ore. 88.
Goldstein vs. Mutual Pac. Ins. Co., 74 Ore. 249.

Oregon Pottery Co. vs. Kern, 30 Ore. 328.

XII.

Error in Restricting Cross-Examination of Martha Randall. (Assignments 25 and 26.)

In the Government's case in chief, Miss Martha Randall, the Superintendent of the Women's Protective Division of the Police Bureau, testified that she had secured the services of Miss Meade and Mrs. Johnson, to assist the Sheriff in these liquor investigations. It was developed on cross-examination that notwithstanding, to the best of her knowledge,

neither of these ladies drank liquor, the thought never occurred to her that they might be called upon to drink liquor and feign intoxication. On re-direct examination, the following proceedings took place:

> Q. Now, Miss Randall, you may state whether or not you knew Mrs. Johnson and Miss Meade to be reliable, responsible girls at the time that you recommended them for that mission?
>
> A. I knew them to be reliable, respectable women.

To the admission of which defendant was allowed an exception.

And thereafter the following proceedings were had:

> Now, with respect to the possibility of their having to drink out there—
>
> Court: I don't think you need go into that.
>
> Mr. Stearns: Well, perhaps not. It was brought out by counsel.
>
> Court: I know it was brought out, but it is wholly immaterial.
>
> Mr. Stearns: That is true, your Honor. It is.
>
> Mr. Goldstein: I take an exception to your Honor's remarks about that.
>
> Court: Well, I want to put an end to this.
>
> (Transcript, pages 117 and 118.)

It seems a rather strange and inconsistent rule,

that would permit the Government to bring out the information, through this witness, that Miss Meade and Mrs. Johnson were reliable and respectable women, yet would justify the court in holding, that the defendant's cross-examination of the witness upon the subject of her knowledge that they might be called upon to drink liquor and feign intoxication, was immaterial. Clearly, the defendant sought to test the credibility of this witness, yet not only were his efforts frustrated in that regard, but the court injected his opinion on the subject of the materiality of the cross-examination, which could not help but influence the jury to the defendant's prejudice.

XIII.

Error in Restricting Cross-Examination of P. V. Rexford. (Assignment 29.)

P. V. Rexford, a Deputy Sheriff, and Government witness, was one of the party that raided defendant's premises on May 15th under search warrant, and he testified to the finding of some ten bottles of liquor under the steps leading from the second story of the house to the veranda. He had testified that the Plantation Inn was not the only place searched that day, that he had been to another place and that other places were discussed after they got to the defendant's premises. On cross-examination the following proceedings were had:

Q. You said you had been to a number of

places on May 15th? Where were you?
Objected to.
Court: Objection sustained.
To which ruling the defendant excepted.

(Transcript page 120.)

The evident purpose of this line of inquiry was to ascertain if this search was part of an organized search of other roadhouses, with a view of confirming the opinion that the same general instructions, as to investigations, were followed in the raids, that were subsequently made. While this, in itself, might be considered a trifling error, yet it merely presents an additional illustration of the restriction the court placed upon our examination of the Government's witnesses, and indicates the difficulty under which the defendant labored in exercising his right of cross-examination.

XIV.

Error in Restricting Cross-Examination of T. M. Hurlburt. (Assignments 38 and 39.)

T. M. Hurlburt, the Sheriff, and a Government witness, testified that he had arranged with Gates to investigate the roadhouses in Multnomah County, Oregon, to determine whether the liquor laws were being violated. On cross-examination an effort was made to ascertain the scope of Gates' employment, and who paid his expenses. The following proceedings will indicate more clearly the nature of this objection.

Q. Who paid his expenses, Mr. Hurlburt?

Mr. Stearns: Now, if your Honor please, this is really not cross-examination.

Mr. Goldstein: This is for the purpose of impeachment, purpose of credibility. I want to know what arrangement he had with Mr. Gates. Mr. Stearns asked him whether he had made arrangements with Mr. Gates on May 10th for the purpose of raiding roadhouses. He also asked him how long he had known Mr. Gates. I am at this time attempting to ascertain from Mr. Hurlburt whether Mr. Gates had been in his employ prior to that time, what he had been employed for, and what arrangements he made with him on May 10th. That he went into on direct examination to determine the extent of his employment of Mr. Gates, if he was employed.

Court: That is the very question the court has tried to keep out of this case from the very beginning. It will not be opened up now.

Mr. Goldstein: *May I ask who paid his expenses; who paid the expenses of Mr. Gates?*

Court: That is immaterial. It is not cross-examination. (Transcript, 122-123.)

Later, in examination, it developed that a few days after these raids, Gates severed his connections with the Government as a prohibition agent, and was employed by the Sheriff as a Deputy Sheriff, whereupon the following proceedings were had:

Q. Is it not a fact you employed him for the purpose of using him as a witness in these roadhouse cases?

Objected to.

Court: The objection to that will be sustained. That is not cross-examination.

Mr. Goldstein: May I ask how long his employment is to continue?

Mr. Stearns: If your Honor please, it doesn't matter.

Court: I will not permit you to pursue that.

Mr. Goldstein: May I have an exception? I think I have made it clear that I am endeavoring to ascertain certain information about the nature of his employment.

Court: Well, you will not be permitted to ask that. He has a right to employ this man. He is not required to give his reasons for it, either.

Mr. Stearns: If your Honor please, if it was counsel's intention to imply by that question that Mr. Gates is held, or is employed by Mr. Hurlburt simply in order that he may act as a witness here, and that he is to be dismissed immediately after this trial, I am going to withdraw my objection to that last question.

Court: The court will not hear that. It is not testimony in this case.

Mr. Goldstein: If counsel desires to withdraw his objection, I may ask him impeaching questions.

Court: Not with the consent of the court.

Mr. Goldstein: I have a certain question to ask him as to certain facts.

Court: Matter material to this case?

Mr. Goldstein: Your Honor has held it was

not material, but he has withdrawn his objection.

Court: The court will not permit that to be gone into.

(Transcript 124, 125.)

The above is sufficiently explanatory of our contention that throughout the trial, defendant's right to cross-examination was prevented and impaired by the court, to the defendant's prejudice.

XV.

Error in Refusing to Permit E. W. Aylsworth to Explain His Testimony as to General Reputation of Plantation Inn. (Assignment 36.)

The Government having been permitted, in its case in chief, to prove the reputation of the defendant's establishment as a place where intoxicating liquor was being kept or sold, the defendant called as his witness one E. W. Aylsworth, for the purpose of proving that the place bore no such reputation among the neighbors residing in that community, who were in a position to know that reputation, uninfluenced by newspaper accounts and prejudiced reports.

Mr. Aylsworth having testified that he was married, and for three years lived across the road from the Twelve Mile House, was first asked if he knew its reputation, and he said, "Yes," and when asked

whether it was good or bad, made the following answer:

> "I have heard that it was bad; and then I have heard that neighbors say right adjoining that they think most of this trouble he is into is mostly bunk; that they don't believe it; they don't believe he had it. I have heard that."

(Transcript, p. 150.)

When an effort was made to explain to the witness that it was the reputation among the neighbors in that community that was being inquired into, the following procedings were had, indicating the attitude of the court in refusing to permit the witness to explain, or qualify his answer, as he certainly was entitled to do. In the face of the fact that his answer was plainly ambiguous, and clearly called for explanation, the court in justice to the defendant, should have granted it.

> Mr. Goldstein: I think the witness ought to understand that it is the reputation among the neighbors in that comunity.
>
> Court: Well, those whom he associated with.
>
> Mr. Goldstein: Yes.
>
> Q. What would you say as to that reputation? Is that good or bad?
>
> Court: Is that good or bad?
>
> A. Those who are—
>
> Court: Just answer the question now.
>
> A. Could I answer the question?
>
> Court: Would you say that is good or bad?

A. I have heard lots of bad things about the place.

Court: What?

A. I have heard it bad.

Q. I will ask you what you have heard as to the reputation of that place, as to whether it is good or bad?

Court: That has already been explained to him.

Mr. Goldstein: I believe I am entitled to have the witness explain that answer, if it is susceptible of explanation.

Court: I think it should stop where the witness puts it by his answer Yes or No.

Q. Well, can you answer what you have stated?

Mr. Stearns: I think that has been ruled on.

Court: Yes, I think the witness has answered the question.

Q. Mr. Aylsworth, probably you misunderstand the question. You have heard the reputation of the place discussed by the neighbors, have you?

A. Yes.

Q. And you have also heard it discussed by people, outsiders, who are not neighbors?

A. Yes.

Q. Now, by the neighbors who are in position to know, have you heard it discussed among them?

A. Yes.

Mr. Stearns: Just a minute.

Court: You have to take the whole thing together, and ask him whether it is good or bad.

Mr. Stearns: He has already done that, your Honor; and, if the court please, certainly he would be bound by the answer of his own witness.

Mr. Goldstein: Oh, I don't know as that is such a rule. I have a right to have the witness explain the answer.

Court: Well, you know that rule as well as anybody in the courtroom.

Mr. Goldstein: About what rule?

Court: About impeachment on reputation.

Mr. Goldstein: I understand the rule perfectly.

Court: You know the practice as well as any man in the courtroom.

Mr. Goldstein: I understand, but where a witness does not understand, I think he has a right to explain.

Q. Now, Mr. Aylsworth—

Court: I think you have to stop now. I will not permit any further inquiry.

Mr. Goldstein: May I have any exception?

Court: Yes, you may have your exception.

Mr. Goldstein: May I state what I would expect the witness to state—not in the hearing of the jury? I want the record to show.

Court: Whatever you state, you may state outside. This jury is an intelligent jury. And state it short.

Mr. Goldstein: This witness will testify that, among the neighbors who know, who are in a position to know, the reputation of that place is very good. But the reputation among those who are not in a position to know, who

base their information upon newspaper account and prejudiced reports, it is not good; and that is what he would explain if permitted to answer; and that he has been himself in the place many times.

Court: You know that is not proper.

Mr. Goldstein: As preliminary?

Court: What he ascertains by being in the place. That is not character testimony.

Mr. Goldstein: As preliminary to that question, I was going to ask him—

Court: As preliminary or in any other sense.

Mr. Goldstein: May I have an exception to your Honor's ruling?

Court: You may have an exception.

(Transcript p. 151-154.)

No citation of authority is necessary to justify the exception taken to the court's attitude toward this examination of defendant's witness, whereby he was prevented from making an explanation, which was warranted by an apparent misapprehension of the nature of the testimony sought to be elicited.

XVI.

Error in Refusing to Admit Evidence of the General Reputation of A. B. Gates for Truth and Veracity. (Assignment 32.)

Gates, the informant, who was responsible for this prosecution, was of course, the principal wit-

ness against the defendant. The credibility given by the jury to his testimony was an important factor in arriving at its verdict. The defendant sought to discredit Gates, by proving that his reputation for truth and veracity was bad, and for that purpose he called as a witness in his behalf one C. E. Carroll, the Sheriff of Jackson County, Oregon, who had held that office for a period of five years. He testified that he knew Gates, had become acquainted with him at Medford, Jackson County, some two or three years ago, and that he knew his reputation in that community for truth and veracity. (Transcript page 141-146.) The efforts of defendant's counsel, to ask the usual preliminary questions of the witness, as to what Gates was doing in that community at that time, were frustrated by the court. The following excerpt is illustrative:

> Court: What is it you want to ask?
>
> Mr. Goldstein: I am going to ask him if he knows the reputation of this man Gates for veracity in Medford, where he had been residing and working as a state Prohibition Agent, working under the county, Jackson County.
>
> Court: Do you know his reputation in Jackson County?
>
> A. I do.
>
> Court: For truth and veracity?
>
> A. I do.
>
> Court: Get to the question, then.
>
> Mr. Goldstein: I thought I could ask a pre-

liminary question or two as to what Gates was doing at that time, if he knows.

Court: I don't think you can ask that question.

Mr. Goldstein: May I have an exception to your Honor's ruling?

Court: You may have your exception.

(Transcript p. 146-147.)

To the writer's knowledge, he knows of no other instance, where the court so drastically closed, to counsel, a preliminary inquiry of this nature. It seemed then, as it does now, that the court erred in refusing to permit us to develop, by this witness, a most important matter, particularly in view of the court's subsequent action, and that is, what was the occupation of Gates in Medford, and was it such that he could have readily acquired a reputation for veracity, within the time of his residence thereat. This, the court would not allow us to establish.

Then, when it was ascertained that Gates had been in Medford about two years ago, the following proceedings were had:

Court: How long was Mr. Gates down there?

A. He was there about three months, I should judge, making an off-hand guess.

Court: Three months?

A. Yes.

Court: Long enough to form a reputation.

A. He certainly did form one.

Court: That is two years ago?

A. I think it was two years ago about last August he came.

Court: He was there temporarily?

A. Yes.

Court: What is it you want to ask?

Q. You may state what was his reputation, whether it was good or bad.

A. It was bad.

Court: Just a moment. I am in doubt whether that should be proceeded with. He was only there temporarily, for a short time.

Mr. Goldstein: I was asking Mr. Gates, if your Honor will recall, what he had been doing for the last four or five years, and most of his time he spent, not in Portland, but in going from place to place. He might have maintained a residence here, but his operations and place of business were in Medford, he testified to, and Salem, and Astoria, and Heppner; and if he stayed in Medford three months, sufficiently long to permit of reputation being established as to his truth and veracity.

Court: I think the rule is that it must be confined to the community in which he resides, and I shall so hold in this case.

Mr. Goldstein: I will take an exception to your Honor's ruling.

Court: You may have your exception. That may be stricken out.

Mr. Stearns: I ask that it be stricken out and the jury instructed to disregard it.

Court: Yes, that may be stricken out, and the jury are instructed to disregard it.

(Transcript, p. 148.)

We contend that the court erred in striking from the record the evidence of Sheriff Carroll, that the reputation of Gates for truth and veracity was bad. The reason for his decision was based upon the fact that Gates had been in Medford only temporarily, and that Portland, and not Medford, was his place of residence. The evidence already showed that Gates had been a detective for thirty years, and that for two years, prior to his connection with the prohibition office, he had been employed by the Anti-Saloon League as an operative in various cities in the State of Oregon. (Transcript, page 59.) It is therefore quite evident that he never stayed in Portland long enough to become known and to acquire a reputation in that city. This was made apparent by the fact that he was able to pose, in Portland, as a cattle-man from Eastern Oregon. While Gates might have made Portland his legal residence, yet it is likewise true that his home was where he was employed, and Sheriff Carroll had testified that he had been in Medford long enough to have acquired a reputation thereat. The following will demonstrate:

> Court: Long enough to form a reputation?
> A. He certainly did form one.
> (Transcript, page 148.)

As stated in 40 Cyc. 2600:

> If a witness has acquired a reputation in a place where he has resided, such a reputation may be shown, although the witness resides there but a short time.

In *Underwood on Criminal Evidence,* page 538, it is said:

> "Evidence of good or bad reputation, existing two or three years prior to the trial, is admissible. It cannot reasonably be presumed that a man of mature age and settled habits would acquire a new reputation in that comparatively short time."

Under note 67 of this text, a number of decisions are cited in support thereof, of which we have selected the following that appear to be the leading cases on the subject:

In the case of *State vs. Cushenberry,* 157 Mo. 168, the court said:

> "This man was a nomad of such malodorous reputation that soon after his arrival in Chillicothe he was pointed out as a 'house breaker.' If the reputation of such a one could not be impeached in the locality where last he lingered, the result would be he could not be impeached at all; and so he would be allowed to testify from the same high plane as the most reputable citizen. Such a doctrine would be intolerable, and often defeat the ends of justice. We do not subscribe to it."

In the case of *Brown vs. Perez,* 89 Tex. 282, at page 289, the court said:

> "Upon authority and sound principles, we think it may safely be said that where the evi-

dence of a witness is such that it fairly raises the issue of his veracity, or where the testimony of other witnesses relating to his character at or near the time of the trial tends to impeach his character for truth and veracity, or in case the person whose character is in issue has removed beyond the jurisdiction of the court, or has been transient, so that he has no fixed and known residence for a time sufficient to make a reputation for truthfulness, resort may be had to evidence of the reputation of such witness at the place of his former residence and at a time remote from the time of trial. No definite rule can be stated which will apply to all cases. Circumstances other than those stated might exist which would render it impracticable to make proof of the reputation of the witness at or near the time of trial or at the place of his residence at that time, and would authorize resort to this kind of evidence."

In *Re Brown,* 143 Iowa 649, the court said:

"From the evidence in this case, it is clear that the witness had acquired a reputation in Lone Tree (a place of temporary residence). * * * In this case, the removal of the witness was into a large city, where his character might be hidden in obscurity for years, without resulting in a general reputation, either for good or bad."

In *Brotherhood vs. Vickers,* 121 Va. 311, the court said:

"The residence or community of a brakeman for the purpose of character testimony, extends

as far as he is well known and people are acquainted with him and his character, and is therefore coextensive with the line over which he works."

XVII.

Error in the Instructions Given, and Refusal to Give Requested Instructions. (Assignments 40 to 50 inclusive.)

(A) It is contended that the court erred in giving the following instruction, to which exception was duly taken:

> "Now, the question involved in this case is a question of fact: Do you believe from the testimony beyond a reasonable doubt, that, at the time or about the time stated in the information, the defendant Merrill had possession of intoxicating liquor? If so, and you do so believe, then you should find him guilty as charged in the first count of the information."
>
> (Assignment 40.)

The defendant also requested that this instruction be modified, by adding that the "posession" of liquor as defined by the act, must be "possession" with intent to sell, and to the refusal of the court to modify such instruction, an exception was also taken. (Transcript, page 173.)

The 18th amendment to the constitution does not make personal use of intoxicating liquor unlawful;

sale, manufacture and transportation are the things prohibited, and while it is true that section 33 of the National Prohibition Act, prescribes a rule of evidence where possession of liquor, shifts the burden of proof upon the possessor, to show that such liquor was lawfully acquired, yet the Act itself does not, under the scope of the constitutional amendment, make the mere possession, stripped of every other fact or incident, a crime. We contend that possession of liquor, in and by itself, is lawful unless it is coupled with the illegal manufacture, sale or transportation. (*U. S. vs. Dowling,* 278 Fed. 630.) (*Hilt vs. U. S.* 279 Fed. 421.) (*U. S. vs. Cleveland,* 281 Fed. 248.) (*U. S. vs. Illig,* 288 Fed. 939.) (*Street vs. Lincoln Safe Deposit Co.,* 254 U. S. 88.) All these authorities were quoted, with excerpts therefrom, under Point II of this Brief (page 9), relative to the insufficiency of count I, charging mere possession as a crime.

(B) It is further contended that the court erred in giving the following instruction, to which exception was duly taken:

> "It is also charged that at the same time he maintained a common nuisance, that is, a place where intoxicating liquor was kept, bartered and sold. Now, a single sale, without more, would not constitute a nuisance But if, however, a sale is made in a place fitted up for the transaction of business, and in the ordinary course of business, as if one should approach a

bar in the business house, ask for and obtain intoxicating liquor from the manager or person in attendance, although there was but one purchase, it would be sufficient to justify the jury in finding that it was a common nuisance, or a place where intoxicating liquors were kept, bartered and sold."

(Assignment 41.)

This is contrary to the interpretation of the Act given by the court in the case of *U. S. vs. Cohen,* 268 Fed. 420, *U. S. vs. Butler*, 278 Fed. 677, and *U. S. vs. Dowling*, 278 Fed. 643, all of which held that under section 21 of the Volstead Act, declaring a place for the unlawful sale of liquor to be a nuisance, the evidence must show that the sales therein were continuous or recurrent; that a single sale would be insufficient. These authorities were quoted, with excerpts therefrom, under Point III of this Brief (page 15) relative to the insufficiency of count III, which is the nuisance charge.

In line with these authorities, the following instruction should have been given, as specifically requested by the defendant:

"In connection with the charge against the defendant for maintaining a nuisance, where intoxicating liquor was kept or sold, I instruct you that the word "maintain" as used in the prohibition act means "continuance" and implies a certain degree of "permanence." Congress by the use of the words "kept and sold"

in violation of the law, means either habitually or continually or recurrently so "kept" and "sold." In other words, a single act or a single sale is insufficient. I therefore instruct you that to constitute a nuisance, the prosecution must satisfy you by evidence beyond a reasonable doubt of the continuance and recurrence of acts or sales in violation of the law. If the evidence falls short of the required proof, your verdict should be for the defendant."

(Assignment 45.)

This requested instruction was prepared in accordance with the interpretation of section 21 of the Volstead Act, as announced in the decisions last cited.

(C) It is further contended that the court erred in giving the following instruction, to which exception was duly taken.

"There has been some evidence offered in the trial of this case tending to show that the establishment conducted by the defendant and known as the Twelve Mile Roadhouse, bore a common reputation as being a place where intoxicating liquor was kept and sold, and I instruct you that that is competent evidence and should be considered by you in determining whether or not the defendant is in fact guilty of maintaining a nuisance at the time and place and in the manner charged in the information."

(Assignment 42.)

That the court erred in this instruction is manifest, from the authorities we submitted in support of our contention that this testimony was inadmissible (Point 4). The National Prohibition Act, which is complete in itself, makes no provision for the admission of this testimony, and in the absence of express statutory authority, the decisions are unanimous in holding, that general reputation is inadmissible to prove the charge made (33 C. J 755). If this were not the rule, it would, in many cases, be easy to convict on mere suspicion. The speech which Shakespeare attributes to Iago has become a truism, that "reputation is oft got without merit, and lost without deserving."

(D) It is further contended that the court erred in failing to instruct the jury, limiting the testimony of the Government's witness, Nickell; as to alleged sales made by the defendant prior to the time of the specific offense charged in the information, and commonly known as the "Gates episode."

Court: Are there any exceptions?

* * * * *

Mr. Goldstein: And also in the court not limiting the testimony of the waiter. I believe he overlooked instructing the jury about that. They have no right to consider that except as it might tend to corroborate, assuming that they believe the offense took place on May 10th.

Court: What is it you refer to?

Mr. Goldstein: Plaintiff brought in a waiter

—Nickell, I believe—as to something that took place in April, prior to this, and which is not the basis of this allegation or charge. May I have the record show they would not have a right to consider that unless they believe the charges alleged in the information have been established as to May 10th?

Court: I think I have made that clear.

Mr. Goldstein: May I have an exception?

Court: Yes. (Pages 172-173.)

Nowhere in the instructions does the court refer to the testimony of Nickell, and the court's omission therein was duly called to his attention. As previously stated in Point 5 of this Brief (page 19) Nickell was called by the government in its case in chief, to testify that in April, 1923, some three weeks prior to the Gates episode on May 10th, which was made the basis of the information, the defendant had sold or dispensed intoxicating liquor to his patrons. Objection to this testimony as immaterial and outside the scope of the case, was duly made. (Transcript, pages 48-50.) The purpose of this testimony was undoubtedly intended to prove intent and knowledge on the part of the defendant, only so far as the charge of nuisance was concerned, and while we do not concede that the court was correct in his ruling on the admissibility of this testimony, even thus limited (as we have already shown under Point 5 of this Brief), we at least expected, that when the court instructed the jury, he would give

the usual appropriate instructions cautioning the jury to consider this testimony not as proof of the identical charge in the information, but merely for their consideration in determining whether or not the defendant maintained a nuisance, and for no other purpose.

As stated in *Saldiver vs. State*, 55 Tex. Crim. 177:

> "Even when such testimony is admissible for any purpose, its effect must be limited by the charge to the purpose for which it was admitted."

That the court erred in failing to give an instruction limiting the purpose for which particular evidence may be considered, *where such instruction was specifically requested*, is too well established to need citation. (26 R. C. L. 1033.) (*Trenton Ry. vs. Cooper*, 60 N. J. L. 219.) (*Bailey vs. State*, 65 Tex Crim. Rep.)

As summed up in the case of *Glover vs. People*, (Ill.) 68 N. E. 464:

> "The court upon the request of defendant should have limited the effect of said proof by a proper instruction."

While it is true that so far as the Federal courts are concerned, error can only be urged, when this instruction is specifically requested (*Hallowell vs.*

U. S., 253 Fed. 855.) (*Pappas vs. U. S.* 292 Fed. 982.) (*Reese vs. U. S.* 203 Fed. 824.) (*Ryan vs. U. S.*, 216 Fed. 13.), this record will show that we not only called the court's attention to his omission in this respect, but specifically requested an instruction covering this testimony. The court apparently was under the impression that he covered this subject in his general instructions, but reference to same will disclose that he failed to do so. (Transcript, pages 160-172.)

XVIII.

Error in Refusing to Instruct the Jury Upon the Defendant's Theory of His Defense. (Assignment 48.)

The theory of the defense in this case, so far as the charges of possession of liquor and maintenance of nuisance are concerned, was that the witness Gates, and his two female associates, went upon the premises in question with their own liquor, and that whatever liquor was possessed in the place or drank thereat, was the liquor introduced therein by these people, and that this was done for the specific purpose of using this liquor as a means of entrapment. Evidence to that effect was testified to by Mr. Underwood, the chauffeur, and Mr. Merrill, the defendant.

At the close of the case, and before the court instructed the jury, the defendant submitted in writing the following requested instructions:

"The evidence in this case tends to show that Mr. Gates and his associates went upon the premises in question with their own liquor and it is contended by the defendant that they did so with the specific purpose of using their own liquor as a means of entrapping the defendant, in committing a violation of the law. I instruct you that the first duty of officers of the law is to prevent and not to punish crime and it is not their duty to incite or create crime for the sole purpose of prosecuting and punishing it. A conviction will not be sustained where the officers originate the intent and apparently join in the criminal act, first suggested by the officers merely to entrap the defendant."

(Assignment 46.)

"Therefore, if you believe that the defendant was induced by the importunity of the officers to violate the law, that is, if he did violate it, and if through their inducement, he sold the liquor or permitted them to drink the liquor on his premises, then you should return a verdict of not guilty, as it is against the policy of the United States courts to sanction a conviction in any case where the offense was committed through the instigation of public agents." (Assignment 47.)

The court refused to give these instructions, but instead, over our objection, gave the following instruction, which presented the theory of the Government, and wholly ignored the theory of the defense:

"It is also in evidence that, after these par-

ties arrived at the roadhouse, they feigned, as one of the witnesses said, intoxication; if they were not really intoxicated, they at least feigned intoxication. Now, if they did that, and the sale was made as claimed by the Government, it would be no defense in this case. One cannot be induced and persuaded by a Government officer to commit a crime, and then be prosecuted, but a Government officer may lawfully afford an opportunity for the commission of an offense, and the testimony of the Government in this case tends to show that that is all these Government witnesses did. They went out to this roadhouse; they, as one of them said, attempted to create an atmosphere that would make it possible for them to buy liquor at that place. You may not approve of that method. It may not be the best method. I don't know. But it would be no excuse or defense for the violation of the law. It may go to the credibility of the witnesses, but if you believe that the sale was made as claimed, then it would be a violation of the statute." (Assignment 44.)

We earnestly contend that the court erred in refusing to present our theory of the case, and in this connection submit the following authorities:

"A defendant in a criminal case, is entitled to have the court clearly state to the jury each distinct and important theory of defendant, so that the jury may understand what they are, and the essential rules of law applicable thereto.

Zoline on Criminal Law, page 368.
Hendry vs. U. S., 233 Fed. 18.

In the case of *Calderon vs. U. S.*, 279 Fed. 556, the defendants were charged with a conspiracy to sell morphine. They were convicted on the testimony of a narcotic inspector, who pretended to be an adict. The narcotics were found in the seat of a buggy, which the defendants used to transport them to the hotel, which was the place of their arrest. It was the contention of the defendants that the buggy belonged to the officer, and that he had put the narcotics there for the purpose of making a case against them. The court was requested to charge the jury that if they believed defendant's contention, they should return a verdict of not guilty. The failure of the court so to do resulted (page 63) in the reversal. The Appellate Court, in its opinion, said:

> "Where the evidence presented a theory of defense and the court's attention is particularly directed to it, it is reversable error to refuse to give any charge on such theory."

In Byrne on Federal Criminal Procedure, page 183, citing *Allison vs. U. S.*, 160 U. S. 203, it is stated:

> "Likewise error is committed when the charge mentions and is founded on evidence on one side and disregards evidence in contradiction of the same point."

In *Bird vs. U. S.*, 180 U. S. 356, 361, the defendant in a murder case testified that he killed in self defense. The court failed to instruct in

terms that if defendant believed and had reason to believe that the killing was necessary for the defense of his life or to prevent the infliction of great bodily harm, then the verdict should be not guilty. The instruction given was negative in form. The opinion states:

> "It is well settled that the defendant has a right to a full statement of the law from the court and that a neglect to give that full statement when the jury subsequently falls into error, is sufficient reason for reversal."

In the case of *State vs. Brody* (Iowa), 91 N. W. 801, the court said:

> "We think, too, the defendant was entitled to have his theory of the possession of the goods specifically called to the attention of the jury with instructions that if such claim was found to be true or to raise a reasonable doubt in the minds of the jurors, he was entitled to an acquittal."

In the case of *Powers vs. Commonwealth,* 110 Ky. 386, 53 L. R. A. 245, the court failed to submit to the jury the view of defendant that the conspiracy charge was a combination which had for its purpose alarm only, and not as charged by the state "to alarm, excite terror and inflict bodily harm." The court said:

> "Whether the evidence was to be believed or not, was a question solely for the jury, under

proper instructions. The accused had the right to have the jury pass upon the question whether that was the sole object of the assemblage, and upon the further question whether the killing of Goebel necessarily or probably would result from such an assemblage. It will not do to say that because the judges would have disregarded such evidence, had they been jurors at the trial, that it is not prejudicial, for the jurors are the sole judges of the weight of the evidence, and to hold otherwise would be for the court to assume to perform those functions which from time immemorial have been regarded as within the sacred province of the jury."

In *Banks vs. State,* 89 Ga. 75, the court said:

"Where, on a trial for murder, the court in its charge, grouped together and stated hypothetically the alleged facts constituting the State's theory of the homicide, it would be the duty of the court if the evidence so authorized, to likewise group and state the alleged facts constituting the defendant's theory."

In *Trask vs. People,* 104 Ill. 569, the court said:

"On the trial of a party for a conspiracy to obtain goods, etc., where the evidence upon the material points in the case is conflicting, it is error to refuse an instruction for the defendant fairly presenting the law on the theory of the case contended for by him, having a basis in the evidence on which to rest."

Further, the court in this instruction, in effect, told the jury that there was no evidence of entrapment. In this the court was plainly in error.

In the very recent case of *De Salvo vs. U. S.*, 2 Fed. (2nd edition), 222, the court said:

> "It was error to refuse to give an instruction of Entrapment as required by defendant, and it was error to instruct the jury that there was no evidence of entrapment."

We further contend that in view of all the surrounding circumstances in this case, that the court should have given the instruction on Entrapment as requested, which was formulated in accordance with the rule frequently cited with approval in the following cases:

Sam Yick vs. U. S., 240 Fed. 60.
Woo Wai vs. U. S., 223 Fed. 412.
Petersen vs. U. S., 255 Fed. 235.
Butts vs. U. S., 273 Fed. 35.
U. S. vs. Eccoles, 253 Fed. 862.
U. S. vs. Eman Mfg. Co., 271 Fed. 352.

This rule is aptly summed up in the recent case of *Newman vs. U. S.* 299 Fed. 128, as follows:

> "The first duty of an officer of the law is to prevent and not to punish crime, and when a criminal offense originates, not with the accused but is conceived in the mind of the Government officer, and the accused is, by persuasion, deception or inducement, lured into the commission of a criminal act, the Government is estopped from prosecution thereof."

CONCLUSION

We bespeak the court's indulgence for the length involved has made it necessary. In our endeavor of this brief, but the importance of the questions to shorten the brief we realize that we have, through our failure to discuss same, in effect, waived a number of assignments that we had filed. This omission is not due to any concession of their lack of merit, but simply for the sake of brevity, and because of our confidence that enough error has already been demonstrated to warrant the reversal of this case.

Whether this 66 year old defendant merits the humiliation and degradation of a jail sentence, in the declining years of his life, is, of course, not a material inquiry, so far as the exact rigor of law is concerned, but the same rigor of the law requires that the verdict should have at least been obtained only after all the legal rights of the defendant had been just as zealously safe-guarded and protected as were the rights of the Government. We hold no brief in support of the agitation that has been aroused over the evils incident to the enforcement of the prohibition law, through the testimony of informers and "stool pigeons." This may be a necessary evil, but if the prohibition law cannot be enforced except through licensing these informers to drink, possess and transport intoxicating liquor, and thereby trample upon the very law that they

themselves invoke and have sworn to uphold, then the prohibition law is doomed to fail, and should fail! Whatever may be our views on this subject, we at least agree upon the fundamental principle that the law in its mercy, exacts no conviction through the diminution of any of the strict and obvious safe-guards that the law confers upon the accused.

With all due respect to the trial court, for whom we entertain the kindliest feelings, we are compelled to state that he unconsciously permitted the denial of those legal rights that every defendant expects will be zealously protected in a United States court.

Respectfully submitted,

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